MAY 29 193

FILE COPY

Supreme Court of the United States.

October Term, 1934.

No. [redacted]83

Norman W. Bingham, Jr., et al.,
Executors u/w King Upton,
Petitioners,

v.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT OF PETITION.

GEORGE S. FULLER,
Attorney for the Petitioners.

NORMAN W. BINGHAM, JR.,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Petition	1
Statement of the case	1
Questions presented	7
Reasons	8
Brief in support of petition	11
Opinions of the courts below	11
Jurisdiction	11
Statement of the case	11
Argument	11
I. The decision sought to be reviewed is in direct conflict with Lewellyn v. Frick, 268 U.S. 238	11
II. The decision sought to be reviewed is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Levy's Estate v. Commissioner, 65 F. (2d) 412	16
III. The decision sought to be reviewed is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Wallace, 71 F. (2d) 1002, and the decision of the Circuit Court of Appeals for the Fourth Circuit in Tait v. Safe Deposit and Trust Company of Baltimore, 74 F. (2d) 851	18
IV. The decision sought to be reviewed is of far-reaching and general importance	24
V. The decision sought to be reviewed is inconsistent with the line of reasoning on which this Court based its decision in the case of Chase National Bank v. United States, 278 U.S. 327, upholding the constitutionality of the corresponding provision of the Revenue Act of 1921	27

Page

VI. The fact that this Court, on May 20, 1935 (No. 879), granted certiorari in the case of Helvering v. St. Louis Union Trust Co., 75 F. (2d) 416, should be a sufficient reason for its reviewing the case at bar 29

TABLE OF AUTHORITIES CITED.

Ballard v. Helburn, D.C. W.D. Ky. (May 2, 1933; now pending) 26
Blodgett v. Holden, 275 U.S. 142 15
Bonney v. Commissioner, 29 B.T.A. 45; affirmed (per curiam) by Circuit Court of Appeals for Second Circuit, March 11, 1935 20
Boyden v. Mass. Mutual Life Insurance Co., 153 Mass. 544 3
Chase National Bank v. United States, 278 U.S. 327 6, 10, 14, 27, 28, 29
Commissioner v. Johnson, 51 F. (2d) 1075 27
Commissioner v. Wallace, 71 F. (2d) 1002; certiorari denied, 293 U.S. 600 9, 18, 19, 20, 25
Commissioner v. Wallace, 27 B.T.A. 902 18
Coolidge v. Long, 282 U.S. 582 21
David A. Reed et al., Executors, v. Commissioner, 24 B.T.A. 166 26
Grandin v. Heiner, 286 U.S. 561 15
Haskell v. Equitable Life Insurance Co., 181 Mass. 341 3
Helvering v. Duke, 62 F. (2d) 1057; affirmed (by divided court), 290 U.S. 591 20
Helvering v. St. Louis Union Trust Co., 75 F. (2d) 416; certiorari granted, May 20, 1935 10, 29, 30
Hodgkins v. Commissioner, 44 F. (2d) 43; certiorari denied, 283 U.S. 825 27
Klein v. United States, 283 U.S. 231 6, 19, 20, 21, 29, 30
Levy's Estate v. Commissioner, 65 F. (2d) 412 9, 16, 17

Page

Lewellyn v. Frick, 268 U.S. 238 5, 6, 8, 11, 12, 13, 14, 15, 24
McCaughn v. Cornill, 43 F. (2d) 69; certiorari denied, 283 U.S. 825 27
McCormick v. Burnett, 283 U.S. 784 19, 25
May v. Heiner, 281 U.S. 238 19, 25, 28
Nichols v. Coolidge, 274 U.S. 531 14
Parker et al., Trustees, v. Commissioner, 30 B.T.A. 342 26
Philip W. Blood et al. v. Commissioner, 22 B.T.A. 1000 26
Pingrey v. National Life Insurance Co., 144 Mass. 374 3
Reinecke v. Northern Trust Company, 278 U.S. 339 6, 28
Smietanka v. First Trust & Savings Bank, 257 U.S. 602 13
Tait v. Safe Deposit & Trust Co. of Baltimore, 74 F. (2d) 851 9, 18, 19, 20
Third National Bank and Trust Company of Springfield v. White, 287 U.S. 577 6
Tyler v. Treasurer & Receiver General, 226 Mass. 306 22
Tyler v. United States, 281 U.S. 497 6, 29
Whiteside v. Merchants National Bank, 284 Mass. 165 23
Wuchter v. Pizzuti, 275 U.S. 13 15

Acts of 1894, c. 522 3
C.C.H. 1933, Federal Tax Service, par. 9338 26
General Laws, c. 175, §§ 126, 144 3
Judicial Code, sec. 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U.S.C.A. Title 28, §347) 11
Massachusetts Acts of 1887, c. 214, §76 3
Revenue Act of 1918, sec. 402 (f) 5, 7, 8, 9, 10, 12, 13, 14, 15, 17, 24, 25
Revenue Act of 1921, sec. 402 (c) 14, 27
Revenue Act of 1924, sec. 302 (g) 13, 16, 17, 26, 27
Revenue Act of 1924, sec. 302 (h) 17
Revenue Act of 1926, sec. 302 (g) 19, 26

Supreme Court of the United States.

OCTOBER TERM, 1934.

No.

NORMAN W. BINGHAM, JR., ET AL.,
EXECUTORS U/W KING UPTON,
PETITIONERS,
v.
THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This petition by Norman W. Bingham, Jr., Annie D. Upton and George Upton, executors of the last will of King Upton, late of Gloucester, in the District of Massachusetts, respectfully represents:

STATEMENT OF THE CASE.

This is an action begun in the District Court of the United States for the District of Massachusetts to recover a part of the estate tax assessed against and paid by your petitioners in 1922 as executors of the will of King Upton, late of said district, who died on February 27, 1921.

The action involves so much of the estate tax as was based upon the inclusion in the gross estate of the pro-

ceeds ($29,369.86) of seven insurance policies issued on the life of the decedent, which were payable to the decedent's widow and son (R. 8-9), the Government claiming that they were required so to be included by the provisions of the latter part of section 402 (f) of the Revenue Act of 1918. This section provided that the value of the gross estate of the decedent should be determined by including the value at the time of his death of all property—

> "(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000. of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

There were other policies amounting to more than the $40,000 exemption on the life of the decedent as to which no question has been raised, so that the only question before the Court was whether the proceeds of these seven policies ($29,369.86) were required by the statute to be included in the gross estate, and if so, whether the statute as applied to these seven policies was constitutional.

The seven policies in question were all taken out by the decedent prior to 1900. All of these policies had been irrevocably made payable to the wife or son, or had been assigned to the wife, long before the Revenue Act of 1918 had been passed. These seven policies fall into three groups:

1. Four Berkshire policies: These were issued in Massachusetts by the Berkshire Life Insurance Company of that State for $5000 each, originally payable to the estate. None of them contained any reservation to the insured of power to change the beneficiary or to pledge or assign the policies (R. 11-34). Under the law of Massachusetts, these

policies could not be surrendered by the insured without the consent of the beneficiary or assignee. (Massachusetts Acts of 1887, c. 214, §76, Acts of 1894, c. 522, General Laws, c. 175, §§ 126, 144.)

Haskell v. *Equitable Life Insurance Co.*, 181 Mass. 341.

Pingrey v. *National Life Insurance Co.*, 144 Mass. 374.

Boyden v. *Mass. Mutual Life Insurance Co.*, 153 Mass. 544.

On June 30, 1904, when the estate of the insured was still the beneficiary, they were assigned by the insured to the insurance company to secure a loan of $5900, which loan remained unpaid until his death, when it was deducted from the proceeds of the policies. On July 25, 1904, they were irrevocably assigned by the insured to his wife, Annie D. Upton, by an instrument which read as follows, and the decedent thereafter had no control over them:

"The original and duplicate Assignment should be sent to the Home Office of the Company, where date of receipt will be endorsed and record made. The original will be retained on file and the duplicate returned.

Assignment (Ed. 1902. Form E. 1M.)

Policies 35,098, 41,714, 47,954, 47,955. (Original)

In consideration of love, affection, and one dollar, I do hereby assign all my right, title and interest in policies number 35,098, 41,714, 47,954, 47,955 issued by the

BERKSHIRE LIFE INSURANCE COMPANY OF PITTSFIELD, MASS.

insuring the life of King Upton of Salem, Mass. and all additions to said policy, whether now or hereafter

apportioned, (reserving and excepting the right to the assured to apply the cash value of any dividends thereon in payment of premiums hereafter due on said policy) unto my wife, Annie D. Upton, provided she survives me. This assignment is made subject to a previous assignment to the Berkshire Life Ins. Co. dated June 30, 1904.

Dated at Boston, Mass. this 25th day of July, A.D. 1904.

In the presence of /s/ King Upton (Seal)
/s/ Thos. Courtis."

On the back of the assignment:

"35,098
41,714 Received at Home Office
47,954-5

397 /s/ Theo. L. Allen, Sec'y."
(R. 35)

2. *One Connecticut policy:* This was a $5000 policy issued to the insured by the Connecticut Mutual Life Insurance Company in 1883, payable on his death—

"to Annie Upton (the Assured,) wife of the said Insured, for her sole use and benefit, or to her legal representatives, thirty days after due notice and satisfactory evidence of the death of the said Insured while this Contract is in full force and effect shall have been received at said office in Hartford, Conn., and upon surrender and satisfactory release hereof; or if the said Assured die before said Insured, the said sum insured shall be payable as above to his children, or to their guardian, if under age; or, if there be no such children or descendants of such children then living, the said sum insured shall be payable to the

legal representatives of the said Insured; . . ." (R. 43).

No right was reserved to change the beneficiary, and the insured was given no authority to pledge or assign the policy. He had no general power to surrender the policy without the consent of the beneficiary, except that during a period of thirty days at the end of the first ten-year period and for a similar period of thirty days at the end of each five-year period thereafter, he could surrender the policy for its cash surrender value (R. 43). The end of the last five-year period preceding his death was in 1918, and the end of the next five-year period did not arrive until 1923, more than two years after his death.

3. Two Manhattan policies: These were issued to the decedent by the Manhattan Life Insurance Company of New York in 1888, for $5000 each, one payable on his death to "Mrs. Annie D. Upton, his wife, her executors, administrators, or assigns," and the other payable on his death to "his son, George Upton, his executors, administrators or assigns." No right was reserved to change the beneficiary or to pledge or assign the policies nor did the insured have any power or control over the policies or their proceeds (R. 37-39).

The District Court held that the proceeds of none of the seven policies were to be included in the gross estate for the reason that in *Lewellyn* v. *Frick*, 268 U.S. 238, this Court held that section 402 (f) of the Revenue Act of 1918 should not be construed to apply to the proceeds of policies taken out before that Act was passed, at least where, as here, the policies had been irrevocably made payable or assigned to the named beneficiaries before that Act was passed (R. 61-64).

The Circuit Court of Appeals, on March 26, 1935 (R. 83-88), sustained the District Court as to the Manhattan policies, giving as the reason that "the insured had no interest in these policies that could be terminated at his death" (R. 88), so that they are now out of the picture; but it reversed the District Court as to the other policies, holding that their proceeds were properly included in the gross estate (R. 87-88), and it remanded the case to that Court for further proceedings not inconsistent with its opinion (R. 92).

As to the four Berkshire policies, the Circuit Court of Appeals, after pointing out in its opinion that this Court in the *Frick* case held that "the Statute of 1918 was not retroactive and therefore did not apply to policies issued prior to the enactment of the Revenue Acts imposing estate taxes" (R. 85), went on to hold that under the decisions of this Court since the *Frick* case (referring to *Chase National Bank* v. *United States*, 278 U.S. 327; *Reinecke* v. *Northern Trust Company*, 278 U.S. 339; *Tyler* v. *United States*, 281 U.S. 497; *Klein* v. *United States*, 283 U.S. 231; and *Third National Bank and Trust Company of Springfield* v. *White*, 287 U.S. 577), the proceeds of these four policies were taxable for the following reason:

> "The wife of the testator under these policies received by the assignment of these policies only a contingent interest, unless she survived the testator. Not until his death was her interest complete. Therefore, there passed to her at his death an additional interest which accrued while the Act of 1918 was in effect" (R. 87).

As to the Connecticut policy, the Circuit Court of Appeals (Bingham, J., dissenting) held that its proceeds were taxable for the following reasons:

"The beneficiary, under this policy, did not have an absolute right to the proceeds, since it was dependent on her surviving the insured. In case she did not survive him, it was payable to the insured's children, or, if there were no such children or descendants thereof living at his death, *the proceeds were made payable to the legal representative of his estate;* and inasmuch as the testator reserved the right to demand its cash surrender value on the day it became a paid-up policy, and at the end of each five year period thereafter, until his death, he had an interest in the policy; and his wife's absolute right to the proceeds was conditioned, not only on her surviving him, but also on his failing to survive each five year period. It was his death before hers which finally terminated his rights under the policy and rendered the rights of the beneficiary absolute and complete. It is obvious, we think, that the wife's rights under the policy were enlarged by his death" (R. 88). (Italics ours.)

Questions Presented.

1. Is the mere fact that the beneficiary's right to the proceeds of a life insurance policy, payable upon the death of the insured, is contingent upon his surviving the insured sufficient to bring such proceeds within the purview of the insurance provision of the Federal Estate Tax Law, where the beneficiary's rights were irrevocably established before the Revenue Act of 1918 (the first one to contain such insurance provision) and the insured thereafter retained no power or control over the disposition of the policy or its proceeds which could limit or affect the rights of such beneficiary?

2. Does section 402 (f) of the Revenue Act of 1918 apply to the proceeds of insurance policies taken out by the

decedent on his own life and irrevocably assigned by him many years before the enactment of that Act to his wife "provided she survives me," the decedent having thereafter no power or control over the disposition of the policy or its proceeds which could limit or affect the rights of his wife?

3. Does section 402 (f) of the Revenue Act of 1918 apply to the proceeds of an insurance policy taken out by the decedent on his own life many years before the enactment of that Act, payable on his death to his wife, or, if she died before he did, to his children, or, if none were then living, to his estate, where the decedent had no power or control over the disposition of the policy or its proceeds which could limit or affect the rights of his wife, except that at the end of ten years from the date (1883) of the policy, and at the end of each period of five years thereafter, the decedent might surrender the policy for cash within thirty days after the end of each such period, the last of such five-year periods before his death having ended May 22, 1918, and the next one not ending until 1923, more than two years after his death?

4. Does section 402 (f) of the Revenue Act of 1918, as construed and applied by the Circuit Court of Appeals to the five policies now involved in the case at bar, violate the Fifth Amendment of the Constitution of the United States?

Reasons.

1. The decision sought to be reviewed is directly contrary to *Lewellyn* v. *Frick*, 268 U.S. 238, in which this Court squarely held that section 402 (f) of the Revenue Act of 1918 did not apply to the proceeds of insurance policies under such circumstances as existed in the case at bar. The facts in the two cases are indistinguishable (*infra*, pp. 11-16).

2. The decision sought to be reviewed, in holding that the mere fact that the beneficiary's right to the proceeds of a life insurance policy are contingent upon her surviving the insured (the decedent) is sufficient to make such proceeds taxable under the Federal estate tax provisions of the Revenue Acts, is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412, as to forty-four of the insurance policies there involved (*infra*, pp. 16-17).

3. The decision sought to be reviewed is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner* v. *Wallace*, 71 F. (2d) 1002 (certiorari denied, 293 U.S. 600), and the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Tait* v. *Safe Deposit & Trust Co. of Baltimore*, 74 F. (2d) 851 (*infra*, pp. 18-23).

4. The decision sought to be reviewed is of far-reaching importance in the field of revenue taxes, for the point on which it turns applies not only to the taxability of insurance proceeds under the Revenue Act of 1918, but also to their taxability under all of the subsequent Revenue Acts. Furthermore, it is contrary to a long line of other decisions of various tribunals in which it has been held that where a grantor has retained no interest in or control over the subject-matter granted—*e.g.*, where the subject-matter granted is a remainder after a reserved life estate, or the proceeds payable at death on a life insurance policy—the fact that the interest of the grantee is contingent upon his survival, or that there is a possibility of reverter to the grantor in case such grantee does not survive, is not sufficient to warrant the inclusion of such property as a part of the gross estate where the grant was made before the passage of the first of the Revenue Acts and the decedent had

no power to revoke or modify or control the property granted (*infra*, pp. 24-27).

5. The decision sought to be reviewed, by construing section 402 (f) of the Revenue Act of 1918 to apply to the five policies now involved, revives the question as to the constitutionality of that section as so applied, and, in holding that the proceeds were taxable notwithstanding that the decedent had irrevocably relinquished control before the 1918 Act was passed, is in conflict with the decision in *Chase National Bank* v. *United States*, 278 U.S. 327 (*infra*, pp. 27-29).

6. The point involved is akin to that involved in the case of *Helvering* v. *St. Louis Union Trust Co.*, 75 F. (2d) 416, in which this Court granted certiorari on May 20, 1935 (No. 879) (*infra*, p. 29).

Wherefore your petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the First Circuit and submit their brief hereto attached in support of this petition.

Respectfully submitted,

GEORGE S. FULLER,

Attorney for Petitioners.

NORMAN W. BINGHAM, JR.,

Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the District of Massachusetts is at R. 61-64, and is reported at 7 F. Supp. 907. The majority and dissenting opinions of the Circuit Court of Appeals for the First Circuit are at R. 83-91, but have not yet been reported.

JURISDICTION.

1. Judicial Code, section 240 (a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (U.S.C.A. Title 28, §347).

2. The date of the judgment to be reviewed is March 26, 1935 (R. 92).

3. The judgment of the Circuit Court of Appeals in substance and effect is a final judgment in that there is left to the District Court nothing but the mere mathematical computation of the amount of tax which had been based on the inclusion of the $10,000 proceeds of the two Manhattan policies.

STATEMENT OF THE CASE.

(See Petition, pp. 1-10, *supra*.)

ARGUMENT.

I.

THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH LEWELLYN v. FRICK, 268 U.S. 238.

A. The two cases are indistinguishable on the facts (except in a way unfavorable to the Government's posi-

tion, *i.e.*, in the *Frick* case the decedent retained control of some policies, whereas he had no such control in the case at bar).

1. In each case the decedent died during the period covered by the Revenue Act of 1918.

2. In each case the amount of tax sought to be recovered was the amount of the estate tax assessed under the last part of section 402 (f) of that Act with respect to the proceeds, in excess of $40,000, received by his widow or child after his decease from insurance policies taken out by the decedent on his own life.

3. In each case the policies had been made payable or assigned to the beneficiary before that Revenue Act was passed.

4. In each case premiums were paid by the decedent up to the time of his death.

5. Each case involved policies where the proceeds were payable, *or assigned*, to the beneficiary *if he survived* the decedent. (This was so as to all five of the policies now involved in the case at bar, and was so as to *all* but two of the eleven policies involved in the *Frick* case.) (See Appendix to the Briefs in *Frick* case.)

6. The four Berkshire policies in the case at bar were substantially identical with one of the policies involved in the *Frick* case, a policy for $20,000 issued by the same insurance company and payable on the same contingency. The *Frick* case also involved a Connecticut Mutual Life Insurance Company policy which was payable on the same contingency and had the same kind of surrender provisions as in the case of the Connecticut policy in the case at bar.

7. In short, in no material way can the two cases be distinguished on their facts or as to the question involved, except that in the *Frick* case the decedent retained control over some of the policies in that he might revoke

the assignment or otherwise change the beneficiary, whereas *in the case at bar the decedent had no such power or control.*

B. This Court, in the *Frick* case, very definitely held that section 402 (f) of the Revenue Act of 1918 should be construed "as referring only to transactions taking place after it was passed." It is clear from an examination of the facts and opinion in that case that the "transactions" which this Court was talking about were the "transactions" by which the beneficiaries acquired their rights under the policies, *i.e.*, the taking out of the policies payable to a named beneficiary, or the subsequent naming of the beneficiaries or assignments of the policies. In other words, that case very definitely held that that Act did not apply where the interests of the beneficiaries were established before that Act was passed.

C. There were three impelling reasons which led this Court to so construe that Act, each of which, and especially the third one, is equally impelling in the case at bar, as the decedent retained no control over the policies.

1. Such a construction would avoid certain doubts as to its constitutionality.

2. The general principle "that the laws are not to be considered as applying to cases which arose before their passage" was thereby preserved, "when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

3. The fact that the corresponding provision of the Revenue Act of 1924 (section 302 (g)) was expressly made to apply to past transactions indicated that Congress had not intended the earlier Act to so apply; *i.e.*, this Court applied the doctrine of *Smietanka* v. *First Trust & Savings Bank*, 257 U.S. 602.

D. The case of *Chase National Bank et al.* v. *United States,* 278 U.S. 327, on which the Court below so strongly relied, certainly did not cast any doubt on the *Frick* case.

1. The *Chase Bank* case arose under the Revenue Act of 1921 and the question was whether the proceeds of certain insurance policies taken out by the decedent *after* that Act was passed, payable to named beneficiaries, but where the decedent retained the *right to change the beneficiary and other rights of control,* could constitutionally be included in the decedent's estate for the purpose of the estate tax. The statutory provision involved was identical with the statutory provisions involved in the *Frick* case.

2. This Court not only referred to the *Frick* case, but expressly recognized it as establishing that the 1918 Act did *not* apply to policies where the beneficiaries' right had been established before that Act was passed, for it said at page 333, after stating the constitutional question raised in the *Chase Bank* case:

> "Similar questions were mooted by counsel, but not decided, in *Lewellyn* v. *Frick,* 268 U.S. 238, 251."

They were mooted and not decided because the construction adopted by the Court had eliminated any constitutional question.

E. This Court in *Nichols* v. *Coolidge,* 274 U.S. 531, 539, again recognized the *Frick* case as having settled the law as to cases arising under the 1918 Act, saying:

> "Under *Lewellyn* v. *Frick,* 268 U.S. 238, at 251, only such [subsequent] transfers come within Section 402 (f)"—

of the 1918 Act.

F. In the opinion of four of the justices in the cases of *Blodgett* v. *Holden*, 275 U.S. 142, at 148, the *Frick* case is cited in support of the proposition that it is the usual understanding "that statutes direct themselves to future, not to past transactions," and in the dissenting opinion of Mr. Justice Brandeis in *Wuchter* v. *Pizzuti*, 276 U.S. 13, at 27, concurred in by Mr. Justice Holmes, the *Frick* case is cited to the point that "a construction which raises a serious doubt as to the constitutionality of a statute will not be adopted if some other construction is open."

G. Thus it appears that, so far as any utterances by this Court are concerned, the *Frick* case is still recognized as the authority as to the meaning and scope of section 402 (f) of the Revenue Act of 1918, and that that case establishes that, in the case of decedent, who died during the period of the 1918 Act, section 402 (f) does *not* apply to the proceeds of his life insurance policy where the ultimate beneficiary was named or the policy was assigned to such ultimate beneficiary *before* that Act was passed. It is also clear that in reaching that conclusion this Court was not concerned with whether the decedent had retained until his death any power to surrender the policy for cash, or to change the beneficiary, or to revoke the assignment, or any other power of control, or *whether the beneficiary's rights were contingent upon his surviving the decedent.* In all such cases, the beneficiary acquired his rights before that Act was passed, and the statute was held *not* to include *any* of such policies.

H. The situation now before this Court is materially different from the situation which existed when this Court denied certiorari in the case of *Grandin* v. *Heiner*, 286 U.S. 561.

1. There was no decision of any other Circuit Court of Appeals in conflict with the decision sought to be reviewed.

2. The decedent had reserved control over the policies involved in that case, whereas in the case at bar the decedent had no control.

II.

THE DECISION SOUGHT TO BE REVIEWED IS IN DIRECT CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF LEVY'S ESTATE v. COMMISSIONER, 65 F. (2d) 412.

A. In the *Levy* case, which involved an estate tax and arose under the Revenue Act of 1924 and came up on appeal from the Board of Tax Appeals, the Commissioner of Internal Revenue had included as part of the decedent's gross estate the proceeds of one hundred and ten policies which were payable at his death to named beneficiaries. The decedent had originally reserved the right to change the beneficiary of these policies. On May 1, 1916, the decedent cancelled his right to change the beneficiary as to forty-four of these policies and irrevocably made his wife the beneficiary. It appears, however, that her interest was contingent upon her surviving the decedent, as the mode of settlement then established provided—

> "That settlement of the full proceeds of this policy shall be made with Sally S. Levy, wife and beneficiary, in accordance with the provisions of Option A and *in event of* her death settlement shall be made in the same manner with . . . children, herein designated as 'contingent beneficiaries' . . ."

B. Option A provided that the insurance company was to retain the proceeds until the death of the last surviving beneficiary or contingent beneficiary, the company in the meantime to pay an annuity equal to 3 per cent of the amount

so retained to the widow. Furthermore, the decedent retained the power to change or revoke the designations of the "contingent beneficiaries," but not of the wife.

C. The Circuit Court of Appeals for the Second Circuit held that, as to these forty-four policies, the decedent, having thus irrevocably designated his wife as the beneficiary, no longer had any power, under the law of New York, to surrender, assign or borrow on the policies so as to affect her right to the 3 per cent annuity without her consent, and that therefore the value of that annuity was not to be included in the gross estate under section 302 (g) of the Revenue Act of 1924.

D. That decision, therefore, directly conflicts with the decision in the case at bar in that the wife's interest in the proceeds of the policies was necessarily contingent upon her surviving the decedent (the insured), and notwithstanding that fact that Court held that the value of such interest was not to be included under the corresponding estate tax provision of the Revenue Act of 1924.

E. It affords no ground for distinction that the *Levy* case involved the 1924 Act, while the case at bar involves the 1918 Act, for section 302 (g) of the 1924 Act is identical with section 402 (f) of the 1918 Act.

F. The fact that section 302 (h) of the 1924 Act expressly made section 302 (g) apply to "transfers, trusts, estates, interests, right, powers and relinquishment of powers . . . whether made, created, arising, existing, exercised, or relinquished before or after the enactment" of that Act is of no importance as far as the issue involved here is concerned, to wit, whether the fact that the beneficiary's interest is contingent upon her survival is sufficient to bring the policy within the Act.

III.

THE DECISION SOUGHT TO BE REVIEWED IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF COMMISSIONER v. WALLACE, 71 F. (2d) 1002, AND THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT IN TAIT v. SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, 74 F. (2d) 851.

A. The Circuit Court of Appeals in the case at bar based its decision as to the four Berkshire policies solely on the fact that the assignment of these policies was to the wife "provided she survives me." The Court's reason was stated by it as follows (R. 87):

> "The wife of the testator under these policies received by the assignment of these policies only a contingent interest, unless she survived the testator. Not until his death was her interest therein complete. *Therefore,* there passed to her at his death an additional interest in the proceeds of the policies which accrued while the Act of 1918 was in effect." (Italics ours.)

B. The situation in the *Wallace* case is, we submit, indistinguishable in principle or in any material way. In that case (which arose in the Board of Tax Appeals and the facts as to which appear in 27 B.T.A. 902) a grantor had transferred property in trust to pay the income to the grantor during her life and on her death to pay over the corpus to her daughter "if she be living." If the daughter predeceased the grantor, the property reverted to the grantor. The Board held that the death of the grantor in 1928 was not the generating source of definite accessions to the property rights of the surviving daughter, and that there was no transfer from

the dead to the living upon which to levy an estate tax. This decision of the Board was affirmed without opinion by the Circuit Court of Appeals for the Second Circuit, citing *McCormick* v. *Burnett*, 283 U.S. 784, and *May* v. *Heiner*, 281 U.S. 238. Certiorari was denied by this Court, 293 U.S. 600.

C. In the *Tait* case, which arose under the Revenue Act of 1926, the decedent had created a trust in 1923 to pay the income to himself for life, and upon his death to pay one-half of the corpus to his wife, if then living. One of the questions was whether this one-half of the corpus was to be included in his gross estate as a transfer intended to take effect at his death, the Government contending that the wife's interest prior to her husband's death was purely contingent, since not until then could it be ascertained whether she would survive, and that hence his death was the generating source which brought into being her new and enlarged property right for her enjoyment, claiming that the case was governed by *Klein* v. *United States*, 283 U.S. 231. The Circuit Court of Appeals for the Fourth Circuit rejected this contention, pointing out that the decision in the *Klein* case was based *not* upon the contingent nature of the gift to the wife, but upon the express reservation of title to the corpus in case of her prior death by the grantee.

In the *Klein* case the decedent had made a deed of property to his wife with *two* habendum clauses. By the *first* the lands were to be held by the grantee "for and during the term of her natural life," and the reversion was "expressly reserved to the grantor and excepted from this conveyance." By the second it was provided, "upon condition and in the event" that the grantee survived the grantor, then, "and in that case only," the grantee was to hold the lands in fee. In its opinion this Court said:

". . . The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder. . . . It follows that only a life estate immediately was vested. The remainder was retained by the grantor. . . .

"It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the *larger* estate into being for the grantee. . . ." (Italics ours.)

D. The Circuit Court of Appeals in the case at bar expressly relied upon the *Klein* case in reaching its decision (R. 85), and therefore conflicts in principle with the *Wallace* and *Tait* cases and several other similar cases, including *Helvering* v. *Duke,* 62 F. (2d) 1057, affirming 23 B.T.A. 1104 (affirmed by a divided Court, 290 U.S. 591), *Bonney* v. *Commissioner,* 29 B.T.A. 45, affirmed (per curiam) by the Circuit Court of Appeals for the Second Circuit on March 11, 1935, where the Courts have rejected the contention that the *Klein* case controls in a situation such as the *Wallace* case where the beneficiary's interest fails if he or she does not survive.

E. Certainly there can be no valid distinction between the nature of the interest of the wife in the proceeds of the policies in the case at bar and the nature of the interest of the daughter of the decedent in the corpus of the trust fund in the *Wallace* case. The corpus of the trust was to be paid to the daughter on the death of the decedent in the *Wallace* case, "if she be living." The proceeds of the insurance policy in the case at bar were to be paid to the wife "provided she survives me." The situation was equally out of the decedent's control in both cases and the grantor retained nothing in either case. In the one case

the beneficiary's interest was irrevocably established by the trust instrument—a contract between the decedent and the trustee. In the other case the beneficiary's interest was irrevocably established by the assignment filed with the insurance company. In each case the beneficiary's rights had become absolute, subject only to her surviving. In each case the transfer was complete as far as the decedent was concerned when made by him, and he had nothing left but the possibility of a reverter. The situation was in no way parallel to the *Klein* case, for in that case the decedent had made a present transfer to his wife of *only* a life estate, and had expressly reserved the *remainder to himself*.

F. As stated by Mr. Justice Roberts in his dissenting opinion in *Coolidge* v. *Long*, 282 U.S. 582, at 631, concurred in by three other justices and in no way disputed by the majority opinion—

> ". . . The test to be applied in cases arising under the Federal Estate Tax law is whether the transferor has parted with every vestige of control over the beneficial enjoyment and possession of the property, and not *whether the beneficiary has received it.*" (Italics ours.)

The "property" in these insurance-policy cases is the proceeds payable at the death, or the right to such proceeds. The fact that the beneficiary is to receive those proceeds only if he or she survives in no way leaves the insured with any vestige of control. The beneficiary's right becomes irrevocably vested when the policies are made payable to such beneficiary and the insured retains no power to change such beneficiary or to surrender or pledge the policy without the consent of such beneficiary.

1. As stated by the Court in *Tyler* v. *Treasurer & Receiver General,* 226 Mass. 306, at 308-309:

> "The rights of the beneficiary attach at once upon becoming so designated by the terms of the contract. Where the beneficiary is the wife of the insured, her rights instantly vest upon a meritorious consideration. It has been said that, apart from any statutory provision, the designation of a beneficiary in a policy of life insurance is in the nature of an executory trust for his benefit of which he cannot be deprived without his consent. Said Chief Justice Fuller in *Central Bank of Washington* v. *Hume,* 128 U. S. 195, at page 206: 'It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries. . . .' The rights of the beneficiary are vested when the designation is made in accordance with the terms of the contract of insurance. They take complete effect as of that time. They do not wait for their efficacy upon the happening of a future event. . . ."
>
> "Whatever the insured does in way of designation of a beneficiary takes effect forthwith. If his act rightly be describable as a gift, it is a present gift which, so far as concerns him, takes effect at once both in possession and enjoyment by the beneficiary. There is no fund in which he has an ownership which is the subject of his act in designating the beneficiary, as in *New England Trust Co.* v. *Abbott,* 205 Mass. 279, and *State Street Trust Co.* v. *Treasurer & Receiver General,* 209 Mass. 373. The insured has no title to the amount due on the policy. He does not and cannot make a gift of that. The right to that amount as an instant obligation does not spring into existence un-

til after his death. Even then the money belongs to the insurer, who is charged with the duty by the contract to pay to the beneficiary. So far as the insured is a 'grantor,' to use the word of the statute, the only thing which he grants or can grant is an interest in a contract. So far as he can make a 'gift,' the only thing which he has to give is a right in a contract. By designating a beneficiary both the 'grant' and the 'gift,' so far as either exist at all, take effect in enjoyment and possession at once. Such a relation does not by fair intendment come within the descriptive words of the statute as 'property . . . which shall pass . . . by . . . gift . . . made or intended to take effect in possession or enjoyment after the death of the grantor.'"

G. The situation is analogous to that of a trust beneficiary whose interest is dependent upon his surviving. In the case of *Whiteside* v. *Merchants National Bank,* 284 Mass. 165, the remainder of a trust, on the death of the life tenant, was to be divided "between the issue of my children then living." In holding that the interest of such issue in the remainder vested in them as soon as they came into being, subject to the issue surviving the testator, the Court said:

> "The only contingency affecting the right of the [issue] to receive his share is whether he shall be alive when that time arrives. By no other contingency can he be deprived of the certainty of sharing in the fund. He has been ascertained as one of the class who must inevitably take when distribution is made, provided he is then alive. The devise to him took effect as a fixed right which must ultimately ripen into an absolute title unless defeated by his prior death."

IV.

THE DECISION SOUGHT TO BE REVIEWED IS OF FAR-REACHING AND GENERAL IMPORTANCE.

A. If allowed to stand, it strikes at the very root of the long-established principle that decisions of this Court establish the law of the United States as to points involved therein, and if Circuit Courts of Appeal can disregard them with such flagrancy as they have done in the case at bar, the situation is left in a state of chaos.

1. The *Frick* case very plainly held that section 402 (f) of the Revenue Act of 1918 should not be construed to apply to the proceeds of insurance policies where the rights of the beneficiaries had been established before that Act was passed, even though such beneficiaries' rights were contingent upon their surviving the insured. The decision in the case at bar flies directly in the face of the *Frick* case by holding that section 402 (f) of the Revenue Act of 1918 applied to the policies in the case at bar, policies which cannot be distinguished from the policies involved in the *Frick* case.

B. The decision thus establishes a new and, we submit, unthinkable principle that, after this Court has determined that an Act of Congress should be construed so as not to apply to a certain set of facts, a lower court may now determine, several years after this Court's decision, that such construction was erroneous and that that Act *does* apply to an identical set of facts merely because the lower Court apparently feels that this Court would, if the case were now before it for the first time, have reached a conclusion opposite to its original conclusion. Such a proposition possibly might not be such a startling one where the question involved was one of general law, as to which

views sometimes change in the course of years. Where, however, the question is one of statutory construction and this Court has determined that Congress meant a certain thing when it passed such statute, no amount of later change in economic conditions or viewpoints of courts or of Congress can furnish any warrant for now holding that the intention of Congress when it passed that statute several years ago was just the opposite from what this Court has already determined to have been its intent.

C. It is probably true that, in the great majority of cases where the proceeds of policies are made payable to named beneficiaries, such payment is contingent upon the beneficiaries surviving the insured. It is also probably true that in a great many of the pending cases involving the estate tax on such proceeds, the beneficiaries' rights were established before the Revenue Act of 1918 was passed, and that in many of those cases the beneficiaries' interests were beyond the control of the insured. Therefore, the controlling point involved in the case at bar as to the contingency of the beneficiary's interest is of far-reaching importance and ought to be settled by this Court. Furthermore, this case is an ideal one for this Court to review in settling this point, for the decision of the lower Court rested simply and squarely on this point.

D. It is also of far-reaching importance for the reason that it is in conflict in principle, not only with the several cases above referred to (including the *McCormick* case and *May* v. *Heiner*, on which the *Wallace* case rested), but also with a long line of decisions of other Courts or tribunals involving not only insurance policies in substantially the same situation as are the policies in the case at bar, but also transfers in trust where the beneficiary's interest is

contingent upon his surviving, which are, we submit, indistinguishable in any material way, *e.g.:*

Ballard v. *Helburn*, D.C. W.D. Ky. (May 2, 1933) (now pending before the Circuit Court of Appeals for the Sixth Circuit) (unreported officially. See C.C.H. 1933, Federal Tax Service, paragraph 9338).

(Two of the insurance policies were assigned prior to Revenue Acts to wife, *if living*, otherwise to daughter, if living, otherwise, to estate of insured. No power to revoke assignment or change beneficiaries. *Held* contingency of wife's interest not sufficient to bring policies within section 302 (g) of Revenue Act of 1926.)

Parker et al., Trustees, v. *Commissioner,* 30 B.T.A. 342 (pending on appeal before Eighth Circuit).

(Insurance policies taken out in 1903 payable to wife, *if living*, otherwise to the estate. No power to change beneficiary. *Held* not within section 302 (g) of the Revenue Act of 1924.)

Philip W. Blood et al. v. *Commissioner,* 22 B.T.A. 1000.

(Five of the insurance policies were taken out prior to 1915, payable to wife, *if living;* otherwise, to insured's estate. *Held* not within section 302 (g) of Revenue Act of 1924.)

David A. Reed et al., Executors, v. *Commissioner,* 24 B.T.A. 166.

(Three of the insurance policies, taken out prior to 1910, payable to wife, but *contingent upon her survival.* No power to change beneficiary. *Held* not within section 302 (g) of Revenue Act of 1926.)

McCaughn v. *Cornill*, 43 F. (2d) 69 (C.C.A. 3d) (certiorari denied, 283 U.S. 825).

(Trust. Income to grantor for life, then to wife *for life*, and after death of both remainders over. *Held* not within section 302 of Revenue Act of 1924.)

Hodgkins v. *Commissioner*, 44 F. (2d) 43 (C.C.A. 7th) (certiorari denied, 283 U.S. 825).

(Trust. Income to grantor for life, and then to wife, *if she survived*, for life. *Held* not within section 402 (c) of the Revenue Act of 1921.)

Commissioner v. *Johnson*, 51 F. (2d) 1075 (C.C.A. 2d).

(Trust. Income to Alice J. MacBeth during grantor's life. Right reserved, *in event of prior death of Alice J. MacBeth*, to change beneficiary of trust. On death of grantor corpus to be distributed as provided in trust. *Held* not within section 402 (c) of Revenue Act of 1921.)

V.

THE DECISION SOUGHT TO BE REVIEWED IS INCONSISTENT WITH THE LINE OF REASONING ON WHICH THIS COURT BASED ITS DECISION IN THE CASE OF CHASE NATIONAL BANK v. UNITED STATES, 278 U. S. 327, UPHOLDING THE CONSTITUTIONALITY OF THE CORRESPONDING PROVISION OF THE REVENUE ACT OF 1921.

A. This Court made it very clear in that case that the basis for its decision was the principle that "it is the termination of the *power of disposition* of the policies by decedent at death which operates as an effective transfer and

is subjected to the tax'" (italics ours), and the inference is strong that, if the power of disposition of the policies had terminated before the Act was passed, this Court would have held that such a transfer was one which could not have been subjected to the estate tax, as there would not, in such a case, have been any transfer at death, the transfer having taken place when the beneficiary became irrevocably designated.

B. In the case of *Reinecke* v. *Trust Company*, 278 U.S. 339, in referring to the *Chase Bank* case, this Court said (p. 345) that that decision "rested on the ground . . . that a transfer *made subject to a power of revocation in the transferor*, terminable at his death, is not complete until his death." (Italics ours.) In that case this Court also laid it down that if the transfer made or benefit conferred by the decedent was complete when made in his lifetime and *was not thereafter subject to defeasance by any action of his*, there was no constitutional warrant for the imposition of any transfer tax at his death.

C. It may be noted that it was also the fact in the *Chase Bank* case, as appears from the Government's argument (p. 332), that the interest of the beneficiary was contingent upon his surviving, but this Court then appears not to have considered that that fact operated in any way to prevent there being any transfer until the death.

D. In *May* v. *Heiner*, 281 U.S. 238, this Court made it clear that, although the interest of a beneficiary of a trust was contingent upon his surviving, such interest was nevertheless vested in him, and had been transferred to him at the time when it was irrevocably created, and not at the decedent's death.

E. In *Tyler* v. *United States*, 281 U.S. 497, relied upon by the Court below, the basis of the decision was that, up to the date of the death of the husband, he retained a legal and beneficial ownership and interest in the property. No such situation existed, however, in the case at bar. The decedent had no legal or beneficial ownership in the proceeds of the policy after he had irrevocably assigned the policies to his wife. As pointed out by this Court in the *Chase Bank* case, the tax is not on the policies; it is on the transfer of the power of disposition over the proceeds.

F. In the case at bar no "power of disposition" of the policies or their proceeds ever existed in decedent, in the case of the Berkshire policies, after their assignment to Mrs. Upton in 1904, or, in the case of the Connecticut policy, after it was taken out (except the power to surrender it during a thirty-day period at the end of every five-year period, the last of which ended more than two years before his death). Nothing but the beneficiary's prior death could have defeated her vested right to the proceeds of the policies. She was the irrevocable beneficiary of the policies.

VI.

THE FACT THAT THIS COURT, ON MAY 20, 1935 (NO. 879), GRANTED CERTIORARI IN THE CASE OF HELVERING v. ST. LOUIS UNION TRUST CO., 75 F. (2d) 416, SHOULD BE A SUFFICIENT REASON FOR ITS REVIEWING THE CASE AT BAR.

A. The points involved in the two cases are akin to each other. In both cases the Government relied primarily on the case of *Klein* v. *United States*, 283 U.S. 231. In the case at bar the Circuit Court of Appeals decided in favor of the Government, relying largely on the *Klein*

case. In the *St. Louis Union Trust* case, the Court overruled the Government's contention as to the *Klein* case and held that the fact that the beneficiary's interest was contingent on his surviving the decedent was not sufficient to render that interest subject to the estate tax.

Respectfully submitted,

GEORGE S. FULLER,

Attorney for the Petitioners.

NORMAN W. BINGHAM, JR.,

Of Counsel.